

WEBINAR

# Managing Through the “Next” Normal

Thursday, May 21, 2020

# Overview

**LABOR & EMPLOYMENT**

**M&A/ COMMERCIAL CONTRACTS/  
CORPORATE GOVERNANCE**

**PRIVACY & CYBER SECURITY**

**LITIGATION**

# Presenters



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# Presenters



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# Labor & Employment

# OSHA Guidance on Returning to the Workplace

- There is no specific OSHA standard covering COVID-19.
- Accordingly, the OSHA general duty clause, Section 5(a)(1) of the Occupational Safety and Health Act, applies. It requires that each employer furnish to each of its employees a workplace that is free from recognized hazards that are causing or likely to cause death or serious physical harm. The general duty provisions can be used by OSHA only where there is no standard that applies to the particular hazard and the employer has its own employees exposed to the alleged hazard.
- All the following elements are necessary for OSHA to prove a general duty clause violation:
  1. The employer failed to keep the workplace free of a hazard to which its employees were exposed.
  2. The hazard was recognized.
  3. The hazard was causing, or was likely to cause, death or serious physical harm.
  4. There was a feasible and useful method to correct the hazard.

# Safely Returning to the Workplace

- Determine when and how to bring back onsite work
- Designate a Return to Onsite Work Team
- Determine a written Return to Onsite Work Plan
- Plan for regular and consistent communication to employees of safety measures
- Plan for enforcement measures
- Planned responses to employee questions

# How Do I Get Employees to Return to Onsite Work?

- Communication in advance of return to onsite work is key
  - Prepare for social distancing measures in the workplace (at start and end of shifts, during meal and rest breaks, and during shifts and meetings)
  - Consider allowing employees who can work remotely to do so
  - Temperature taking; Virology Tests
  - Hygiene expectations
  - Visitor policies
- Consider offering incentives
- Responding to Employee Questions and Concerns
- Planning ahead with regard to increased costs (protective gear, new furniture, incentives, etc.)
- What about postponing new hire start dates?



# What if Employees Don't Want to Return to Onsite Work?

- EEOC has issued guidance:
  - Employer need not grant telework as a reasonable accommodation to every employee *with a disability* who wishes to continue the work-from-home arrangement after the public health measures are no longer necessary
  - There are alternative reasonable accommodations to teleworking
  - Interactive dialogue need not wait until the employee returns to work
  - Employees only have a right to reasonable accommodation for their own disability, not members of their household.

# M&A/Commercial Contracts/Corporate Governance

# Commercial Contracts

- Assess your commercial capabilities.
  - Pandemic has shone a bright light on all aspects of resiliency—remote working capabilities, operational redundancies and pivoting speed.
- Take near term-mitigation measures under supplier and customer contracts.... From supply chain issues to potential force majeure issues.
  - Identify areas for improvement and planning short- and long-term remediations.
  - Pandemic and associated economic slowdown are severely testing commercial agreements made in better times.
- Revisit standard templates -- Time for a more bespoke approach?
- Take a hard look at how much margin of error you have in your inventory control
  - “Just-in-time” vs. “inventory build”
  - How much profit you need to forego in exchange for certainty?

# Pro-active M&A Deal Strategies

- Current drive to hoard cash.
- Changing deal terms for buyers and sellers in an uncertain environment.
- Seller: core vs. non-core assets; Cash and liquidity considerations.
- Buyer: Financing considerations; cash, stock, earnout, and/or seller paper
- Earnout: Inability to value the company and allocate risks in times of uncertainty otherwise kills deals.
- When deals do resume, volume will be driven by pent-up demand and the reshuffling of assets among firms.
- Due diligence best practices should be recalibrated to include a greater focus on resiliency, from supply chains to contracts.
- Companies need to be prepared to both exert that level of scrutiny and to be subjected to it.

# Corporate Governance and Stakeholder Communications

- Delivering sound and objective board communications – clear, reliable and frequent.
  - Equally applicable to other stakeholders: Employees, vendors, customers
- Actions boards take today, while in survival mode, must stand up to public scrutiny tomorrow.
- When making tough decisions, boards should be guided by a focus on safeguarding reputation and staying “on brand.”
- Oversight of everything from disclosures in documents filed with the SEC to execution of business continuity plans, must be thorough.
- Whatever weaknesses that surface should be addressed with sustainable changes to procedures and policies.

# Privacy & Cybersecurity

# Identifying Risk and updating Data Security Practices

Updating Information Security Policies (BYOD)

Remote Connection – (WiFi/VPN)

Secure Communications

Third Party Collaboration Software

Video Conferencing

Cyber-response Plan Updated for Remote Work Environment

# Partner with Employees on Security



Redistribute  
Information Security  
Policy



Partner on Patching  
(Anti-virus,  
malware, etc.)



Handling of PII,  
printing, storing on  
local computers



Use of company email



Use approved file  
sharing, messaging,  
web conferencing



Provide appropriate  
channels to report  
breach/problems



# Plan your Cyber-response



Maintain a hard copy of your Response Plan and Cyberinsurance



Have off channel contact information for Response team.



Designate a person to be an Incident Commander



Know who to call to remove access or shutdown a service



Understand notification obligations under CCPA



Use Reasonable Efforts to Monitor for Cyberattacks

# Litigation

# Disruption to Pending Litigation

- Federal and state courts across the country are continuing to alter procedures, restrict access, and postpone certain proceedings to prevent the spread of the coronavirus.
- Courts generally remain closed to the public, and other than certain criminal matters and TROs, hearings are being delayed or conducted by telephone or video conference.
- Federal and state trial courts generally have suspended all jury trials, though some courts have begun to hold bench trials by video.
- Even when courts begin to resume “normal” operations, civil trials are likely to look much different.

# How Parties Can Push Cases Along

- Case schedules have inevitably been impacted.
  - Many courts have adopted emergency orders extending rule and statute-based deadlines
  - For other deadlines, courts have generally indicated that parties should work cooperatively to extend schedules as necessary
- Adjust case schedules by agreement where needed, while making progress where possible.
- Employ remote tools.
  - Document collection
  - Witness interviews
  - Depositions
  - ADR (arbitration, mediation)

# Spike in Litigation

- While pending litigation has been interrupted by COVID-19, a new wave of litigation related to the outbreak has already started to form with cases being filed nationwide alleging a wide variety of claims.
- The all-encompassing nature of the pandemic and its impacts means that potential COVID-19-related liability exists across most practice areas, as reflected by the diverse array of case filings seen so far, including:
  - Products Liability
  - Securities
  - Commercial contracts
  - Insurance
  - Trademark
- There is also likely going to be a spike in medmal, bankruptcy and antitrust litigation.

# Presenters



## Victoria Harvey

SVP & Chief Legal Officer

Smile Brands

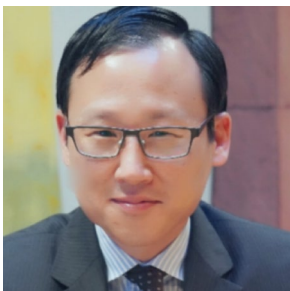
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Victoria Harvey brings over 20 years of legal experience to Smile Brands Inc. (SBI). She joined Smile Brands in 2014 as Associate General Counsel and was appointed Senior Vice President and Chief Legal Officer (CLO) in April 2015. In her capacity as CLO at SBI, she oversees all legal affairs, including mergers & acquisitions, corporate governance, regulatory compliance, intellectual property, risk management, contracts, government affairs, insurance portfolio, pre-litigation and litigation matters and strategic legal matters. Victoria also is passionate about Smile for Everyone Foundation, and serves as one of its Directors.

Prior to joining Smile Brands, Victoria practiced commercial and employment litigation with the law firms of Loeb & Loeb LLP in Los Angeles and Theodora Oringer Miller & Richman PC in Costa Mesa, Calif. Subsequently, in 2007, she started her in-house legal career with Real Mex Restaurants, which at the time was the largest full-service Mexican restaurant company in the U.S.; in 2010, she was promoted to Senior Vice President, General Counsel and Corporate Secretary, where she handled all of the company's legal functions.

She has extensive experience as in-house counsel with a record of advising senior management on critical legal issues while focusing on balancing business goals and minimizing company legal exposure. She has managed and directed all manner of company legal functions, including service, vendor, lease, supply chain, distribution, technology, marketing, non-disclosure, franchise and purchase/sales agreements; developed policies and procedures to ensure compliance with state and federal regulatory laws; corporate governance for public reporting and privately held companies; intellectual property, trademarks, confidentiality and trade secrets; litigation management; insurance portfolio management; and day-to-day guidance with respect to professional, employment/labor and general liability issues.

Victoria is a graduate of California State University, Fullerton, receiving a Bachelor of Arts degree in political science. She earned her Juris Doctorate degree from Whittier Law School in Los Angeles, graduating valedictorian and summa cum laude.



## Wade Pyun

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Wade Pyun is Senior Vice President and Chief Legal Officer for Altura Credit Union. Prior to joining Altura, Wade worked in various leadership roles, including Senior Corporate Counsel at U.S. Bank. His previous experience also includes advising the California state legislature on policy matters involving consumer protection laws and regulations.

Wade earned B.A. and M.A. degrees in English literature from Stanford University, and a J.D. from the University of California, Hastings College of the Law.





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Eva is a “savvy dealmaker” who is consistently named a top California lawyer by national and regional publications. With over 20 years of experience, Eva works with some of the most active private equity funds in the country and provides “astute commercial advice” alongside her strategic M&A counseling when negotiating on behalf of U.S. and global public and private companies, boards of directors, and private equity funds involving their most significant transactional matters. Eva is the managing partner of Winston’s Los Angeles office and is a member of the firm’s Executive Committee.

As co-chair of Winston’s Private Equity Practice, Eva Davis concentrates on U.S. and cross-border complex business transactions with a particular focus on mergers and acquisitions and private equity. As an advisor to strategics and private equity funds and their portfolio companies, she has counseled domestic and international clients in public and private M&A transactions, public and private debt and equity financing transactions, including initial public offerings, and distressed sales and investments in and out of bankruptcy. Eva has also represented public companies and their boards of directors and special committees in connection with enterprise-transformative business opportunities and legal challenges, as well as providing corporate governance advice.

Eva has served as lead deal counsel and negotiated and completed transactions in a wide variety of industries, including aerospace, automotive, business and financial services, consumer products, energy, entertainment, industrials and manufacturing, medical devices, pharmaceutical, retail, semiconductor, software, technology and telecommunications. Her transactional experience includes deals ranging from tens of millions of dollars (for initial private equity investments and financings) to more than \$1 billion (for acquisitions, industry consolidations and dispositions).

Eva has been consistently recognized by local and national publications for her excellence, leadership, and client service. She was listed in the 2016-2020 editions of *The Best Lawyers in America* and has been ranked by *Chambers USA* in the Corporate/M&A/Private Equity category from 2014-2020. Eva was recognized on *Mergers & Acquisitions* list of 2019 and 2020 Most Influential Women in Mid-Market M&A (where only five of the 42 women dealmakers honored in 2020 are lawyers), and as the Leading Private Equity and Strategic M&A Transactions Lawyer of the Year in California, by *AI’s 2019 Leading Advisor Awards*.

Eva graduated *cum laude* from Harvard Law School and *summa cum laude* from Duke University where she double majored in Economics and Political Science and was a member of Phi Beta Kappa.



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Sheryl Falk is recognized as a leading lawyer in privacy, data security and trade secrets. As co-leader of the firm's Global Privacy and Data Security Task Force, she brings significant expertise and strategic thinking to help her clients comply with fast changing privacy and data security obligations and protect their critical data, investigate and respond to data security incidents and handle trade secret matters. Sheryl is a former Federal Prosecutor and Certified Information Privacy Professional and has been recognized in *Legal 500*.

Sheryl draws on her deep expertise in privacy, data security, and forensic technology as well as her strong litigation background to handle complicated privacy and data protection issues. Sheryl's knowledge, responsiveness, and unique strategic guidance has earned the trust of her clients. Sheryl's unique skills and deep experience allow her to provide tactical and thoughtful advice on privacy and data protection strategies, that helps them to be in the best position to mitigate the risks involved in the application of privacy laws, especially clients in emerging technologies such as Artificial Intelligence and Internet of Things. Sheryl honed her investigation skills as a Federal prosecutor and now uses that strength to investigate and litigation data security matters.



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Chair of Winston's Los Angeles and Silicon Valley labor and employment practices, Monique focuses on defending employers in large national wage and hour class actions. Since 2012, she has been recognized in Southern California's *Super Lawyers* as a "Rising Star" in the area of Employment Litigation: Defense, has repeatedly been named a "Top Woman Attorney in Southern California" by *Los Angeles Magazine*, and received *Euromoney LMG's* 2018 Rising Star award for labor and employment, an award given to the top attorney under the age of 40 in the country.

Monique represents employers in a broad range of employment matters, including claims for wrongful termination, employment discrimination, harassment, whistleblower claims, breach of contract claims, and wage and hour claims. She has successfully defended employers across the country in class and collective actions, as well as single plaintiff cases that have gone to trial and arbitration. Monique also assists employers in compliance with federal and California state statutes and regulations through counseling and development of employee manuals, personnel policies, and a variety of employment agreements.



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With more than 30 years of experience as a labor and employment litigator and counselor, Laura represents major employers in all aspects of employment relations, including litigation and preventive counseling and guidance. She has extensive experience defending employers in class actions, and also in multi- and single-plaintiff cases in state and federal courts, and has consistently achieved favorable results both before and at trial and arbitration. Clients say “she is a very strong, aggressive, and extremely confident adviser.” (*Chambers USA 2018*).

Laura Petroff guides clients in handling key employment-related challenges, including protection of assets, prevention of employee raiding, dealing with trade secrets and non-competes from either direction, and working to achieve high-level management goals without significant disruption or fees and costs created by extended litigation.

Her representations have involved claims ranging from sexual harassment to various types of discrimination, whistleblower, and non-competition agreement matters, and she has focused considerable attention on defending employers in class actions, particularly wage and hour cases.

Laura also has substantial experience handling negotiations, trainings, investigations, and the preparation of employment contracts, confidentiality agreements, and non-competition agreements. She routinely counsels clients on a wide array of employment matters, including wrongful discharge, privacy, employee raiding and trade secrets, disability accommodation, employee discipline, managing leaves of absence, and equal employment opportunity.

Laura represents employers in the consumer and luxury goods, cosmetics, financial services, manufacturing, professional services, health care, and retail industries, among others.



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John has been recognized by numerous legal directories – including *The Legal 500*, *Law360* and *Benchmark Litigation* – in the areas of securities and M&A litigation. Clients credit his “straight-shooter” approach and “credibility with judges” as the reasons they “just trust him” (*Law360*).

John is a member of Winston & Strawn’s Securities Litigation Group, which *The Legal 500* describes as a “fabulous, ... first-rate” team of litigators. He regularly represents public and private companies and their officers and directors in a broad range of complex commercial disputes, including securities and consumer class actions, pre- and post-closing M&A litigation, shareholder derivative suits, board-level investigations and other corporate governance matters. In his 20-year career, he has successfully represented clients in a variety of industries, including: pharmaceuticals and medical devices; private equity; financial services; infrastructure; retail and consumer products; technology; beverage alcohol; and sports and entertainment.

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